1995

Frank Brgoch and Seymour Isaacs v. Ronald Allen Harry : Reply Brief of Appellants

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

FRANK BRGOCH and SEYMOUR ISAACS, Plaintiffs/Appellants, vs. RONALD ALLEN HARRY, an individual; PRIVATE LEDGER FINANCIAL SERVICES, INC., LINSCO FINANCIAL SERVICES, INC., LINSCO/PRIVATE LEDGER CORPORATION; and DOES 1-10, Defendants/Appellees.	)	Case No. 950238-CA Priority No. 15

REPLY BRIEF OF APPELLANTS

Appeal From an Order and Judgment of the Third Judicial District Court, In and For Salt Lake County, State of Utah, The Honorable Glenn Iwasaki, Judge Presiding.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

OTHER AUTHORITIES

IN THE UTAH COURT OF APPEALS

FRANK BRGOCH and SEYMOUR ISAACS,	)	
Plaintiffs/Appellants	)	
vs.	)	Case No. 950238-CA
RONALD ALLEN HARRY, an individual; PRIVATE LEDGER FINANCIAL SERVICES, INC., LINSCO FINANCIAL SERVICES, INC., LINSCO/PRIVATE LEDGER CORPORATION; and DOES 1-10	)	Priority No. 15
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REPLY BRIEF OF APPELLANTS

ARGUMENT

In their opening brief plaintiffs/appellants Frank Brgoch and Seymour Isaacs argued first that the trial court ignored the concept of apparent authority when it granted defendant Private Ledger's motion for summary judgment. Plaintiffs argued that the case law, including a 1995 case from this Court, Horrocks v. Westfalia Systemat, 892 P.2d 14 (Utah Ct.App. 1995), clearly holds that a principal is liable for the acts of an agent even when the acts are forbidden by the principal and are detrimental to the principal. Secondly, Brgoch and Isaacs argued that disputed issues of material fact concerning the authority granted to Defendant Harry by Defendant Private Ledger remained and should have precluded summary judgment in this case.

In response to these arguments, defendants (hereinafter collectively "Private Ledger" or "Defendants") first claim that the trial court's decision granting of the summary judgment was correct. With respect to this claim, Private Ledger makes two assertions: first, Private Ledger claims that Plaintiffs Brgoch and Isaacs were sophisticated investors and could not have reasonably believed that Harry had authority to sell interests in the limited partnership. Secondly, Private Ledger claims that the trial court's interpretation of the law is correct. Next Private Ledger claims that even if the trial court's interpretation was incorrect, the summary judgment should be affirmed by this Court based on the alternative ground that Plaintiffs' claims were filed outside the limitations period.

Some of Private Ledger's claims should not be considered because they are not properly before this Court. On the only issue which is properly before this Court, the validity of the trial court's ruling on the merits, Private Ledger's position, and that of the trial court, is simply contrary to the weight of authority in Utah.

POINT I

THE TRIAL COURT'S RULING THAT PRIVATE LEDGER IS NOT LIABLE IS CONTRARY TO EXISTING LAW BECAUSE IT IGNORES THE DOCTRINE OF APPARENT AUTHORITY.

A. Private Ledger's claim that Brgoch and Isaacs were sophisticated investors and could not reasonably have believed that Private Ledger was involved is not properly before this Court because the trial court specifically ruled that this question is an issue of material fact and Private Ledger has not cross-appealed. Even if this Court reaches the merits of this issue, the trial court's ruling that this question should not be resolved by summary judgment is correct.

1. *This issue is not properly before this Court.*

Private Ledger's claim that Brgoch and Isaacs are sophisticated investors (or, as the appellee's brief states, "they could not reasonably have believed that Harry had Private Ledger's

authority" to sell the securities at issue) is not properly before this Court. Private Ledger fails to disclose that this issue was presented to the trial court which ruled that the issue is one of material fact which must be decided by the trier of fact. (R. 285) When an issue is resolved by the trial court against a party, that party should raise the issue either on direct or cross appeal and should not wait until the briefing stage of appeal to raise the issue. State v. South, 885 P.2d 795, 798 (Utah Ct. App. 1994), cert. granted, 899 P.2d 1231 (Utah 1995); Henretty v. Manti City Corp, 791 P.2d 506, 511 (Utah 1990); American Coal Co. v. Sandstrom, 689 P.2d 1, 4 (Utah 1984); Cerritos Trucking Co. v. Utah Venture No. 1, 645 P.2d 608, 613 (Utah 1982). Because of the trial court's disposition on this issue and Private Ledger's failure to cross-appeal that disposition, this issue is not properly before this Court.

Private Ledger contends that Brgoch and Isaacs were aware that the transaction in question was "highly irregular" and that Brgoch and Isaacs could not "have reasonably believed that the [investment] was a regular securities offering being sold through Private Ledger," because of their investment experience. See, Amended Brief of Appellees at 13-17. Although Private Ledger does not use the terminology "sophisticated investors" in its brief, this argument is, in fact, the argument made to the trial court that Brgoch and Isaacs were sophisticated investors.[1] However, Private Ledger fails to disclose that the trial court specifically ruled that the question of whether Brgoch and Isaacs were sophisticated investors was a disputed issue of fact which must be determined by the trier of fact. (R. 285) In ruling on a motion made by Defendant Ron Harry which included this issue, the trial court specifically stated, "The fact that

[1]Indeed, if this is not the same argument made in the trial court, then Private Ledger is raising this issue for the first time on appeal and is prohibited from doing so. See, Warburton v. Virginia Beach Fed. Sav. & Loan Assn.,899 P.2d 779, 782 n.5 (Utah Ct. App. 1995).

I also find it is disputed fact as to whether or not the plaintiffs are a credited vis-a-vis sophisticated and whether or not a finder of fact would so determine, I will leave that up to a jury issue." (R. 842-43; 285) This ruling was made on a motion by Defendant Harry.[2] However, because the issue is identical, the ruling is res judicata with respect to Private Ledger.[3]

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[2]When this issue was raised by Private Ledger at a later date the trial court stated, "I do not have to reach the point that they are sophisticated and/or somehow registered investors . . . ." (R. 848) The trial court did rule identically with respect to the statute of limitations issues raised independently by Defendants Harry and Private Ledger. This clearly indicates that because the issues were identical for both parties, the trial court's ruling with respect to one would be res judicata with respect to the other or stare decisis would apply.

[3]The doctrine of res judicata includes the theories of issue preclusion and claim preclusion. Sevy v. Security Title Co., 902 P.2d 629, 632 (Utah 1995). The theory which is applicable here, issue preclusion which is also known as collateral estoppel, prevents relitigation of issues which have been fully adjudicated. State v. Sims, 881 P.2d 840, 843 (Utah 1994). Res judicata is applied "when there has been a prior adjudication of a factual issue and an application of a rule of law to those facts. In other words, res judicata bars a second adjudication of the same facts under the same rule of law." Salt Lake Citizens Cong. v. Mountain States Tel. & Tel., 846 P.2d 1245, 1251-52 (Utah 1992).

Issue preclusion has four requirements. Sevy, 902 P.2d at 632. First, the challenged issue in the current case must be identical to the issue decided in the prior action. Id. Second, the issue must have been finally decided on the merits. Id. Third, the issue in the prior action must have been "competently, fully, and fairly litigated. Id. Finally, the opposing party in the immediate action must have been either a party or privy to the first action. Id.

In this case all of the requirements of issue preclusion are met. The issue of the plaintiffs' sophistication as investors (and thus the reasonableness of their beliefs regarding Private Ledger's involvement) was squarely presented in Defendant Harry's motion to dismiss. (R. 65-95) The issue was decided on the merits by the trial court in a manner that was final until the ultimate resolution in that court. (R. 842-43) Third, the issue was presented in memoranda and oral argument to the trial court and thus, it "competently, fully, and fairly litigated." Finally, Private Ledger was a party at the time of Harry's motion and, in fact, the record reveals that Private Ledger's local counsel attended the hearing which included this issue. (R. 841) Therefore, res judicata is clearly applicable to this issue.

Even if res judicata does not preclude review of this issue, stare decisis does preclude review. "Stare decisis requires that a decision rendered by a court in a particular factual context governs later decisions by that court arising under the same or similar facts." Sims, 881 P.2d at 843 n.7; see also State v. Thurman, 846 P.2d 1256. 1269 (Utah 1993).

Because this issue was decided by the trial court adversely to Private Ledger, Private Ledger was required to file a cross-appeal to raise it in this Court. The requirement that an issue be raised by a cross-appeal was most recently addressed in State v. South, 885 P.2d 795 (Utah Ct. App. 1994), cert. granted, 899 P.2d 1231 (Utah 1995). In South, the trial court ruled that a search warrant was invalid but upheld the search on other grounds. On appeal, the State argued that even if the other grounds cited by the trial court for upholding the search were invalid, the search was still appropriate because the search warrant was valid despite the trial court's ruling to the contrary. However, the State did not raise the issue of the validity of the search warrant, an issue on which it had lost in the trial court, by a cross-appeal. 885 P.2d at 797. Rather, the State chose to wait and argue the point in its appellate brief after the opening brief of the defendants had been filed. The State asserted that it could do so because it said that the appellate court could affirm the trial court on any legitimate basis and therefore, it was relieved from the requirement of filing a cross-appeal on an issue on which it had lost in the trial court. 885 P.2d at 798. This Court held that the State's argument was too sweeping. Specifically, this Court stated,

> It is significant that the trial court explicitly ruled on the issue of the warrant's scope, thus providing scant excuse for the State's failure to cross-appeal that ruling. When an issue is squarely presented to and ruled on by the trial court, a party should raise the issue either on direct or cross-appeal and not wait until the briefing stage of the appeal to raise the issue.

885 P.2d at 798. This Court then held that because the State did not file a cross-appeal of the trial court's ruling on the validity of the search warrant, the issue would not be considered on appeal. Id.

Similarly, in this case, the issue of whether Brgoch and Isaacs were sophisticated investors was explicitly ruled on by the trial court. Private Ledger has provided no reason for failing to cross-appeal. Therefore, Private Ledger's failure to cross-appeal should preclude it from raising the issue at the briefing stage of this appeal.

2. *The trial court's ruling on this issue was correct.*

Even if this Court determines that this issue is properly before it, the question of whether Brgoch and Isaacs were sophisticated investors and thus, the reasonableness of their beliefs about Private Ledger's involvement were disputed issues of material fact, as the trial court ruled. Evidence presented to the trial court raised numerous factual questions concerning the sophistication of plaintiffs.

A sophisticated investor is held to a higher duty of inquiry and sophistication is also relevant to the reasonableness of an investor's reliance on representations made by a broker. See, e.g., Zobrist v. Coal-X, Inc., 708 F.2d 1511, 1516-18 (10th Cir. 1983); In re AES Corp., 849 F. Supp. 907, 910 (S.D.N.Y. 1994). However, the term "sophisticated investor" is not amenable to an exact, all-inclusive definition. In fact, one scholar has listed a number of considerations which might be weighed by courts facing an issue concerning the sophistication of specific investors. C. Edward Fletcher, Sophisticated Investors Under the Federal Securities Laws, 1988 Duke L.J. 1081, 1149-54 (hereinafter, "Fletcher, Sophisticated Investors"). The considerations which apply to individual investors listed by Fletcher cover five pages and Fletcher states: "It should be emphasized that these considerations are *merely relevant*, and none should determine the outcome of the sophistication inquiry. Rather, courts should review the criteria as a whole, shifting emphasis as appropriate from case to case." Fletcher, Sophisticated

Investors at 1149. The very nature of the issue dictates a factual inquiry be undertaken in each case. If the facts concerning an investor's sophistication are in dispute, as was the case here, then summary judgment on the issue is precluded.[4] Finally, even sophisticated investors are owed certain fiduciary duties and are entitled to protections afforded by securities laws. See, e.g., Wheat v. Hall, 535 F.2d 874, 876 (5th Cir. 1976). Based on the nature of the inquiry and evidence presented in the trial court, the trial court's ruling, that this is a factual issue not properly decided on summary judgment, is correct.

B. The Trial Court's Ruling in Favor of Private Ledger Clearly Ignores the Doctrine of Apparent Authority and Utah Cases Which Have Established that Doctrine.

When it ruled in favor of Private Ledger on the motion for summary judgment, the trial court erroneously focused on the actions of Defendant Harry with respect to Private Ledger rather than on the apparent authority which Private Ledger had bestowed upon Harry, its agent. In their opening brief Brgoch and Isaacs argued that the case law in Utah on apparent authority demonstrates Private Ledger should be held liable for the acts of its agent, Defendant Ron Harry. Harry appeared to have authority granted by Private Ledger to sell the Red River Limited Partnership to the plaintiffs. The cases, including a recent case from this Court, clearly hold that a principal is liable for the acts of an agent even when the acts are forbidden by the principal and are detrimental to the principal.

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[4]In this case the trial court was presented with evidence on many of the considerations raised by Fletcher. For example, the plaintiffs never executed any questionnaires or other documentation concerning their sophistication. The plaintiffs did not have the high annual income or net worth usually associated with sophisticated investors. Neither plaintiff had significant experience in investing and the plaintiffs had little or no knowledge of the investment industry. (R. 135, 141-52)

The most recent case from this Court on the issue, Horrocks v. Westfalia Systemat, 892 P.2d 14 (Utah Ct. App. 1995), is indistinguishable from this case. Horrocks, which was discussed at pages 11 through 14 of the Brief of Appellant, holds that basic agency law requires that the principal be bound by the acts of an agent clothed with apparent authority even when the agent's acts adversely impact the principal. 892 P.2d at 15. This Court stated that if a loss is to be suffered because of the misconduct of an agent, the loss should be "borne by those who put it in his power to do the wrong." 892 P.2d at 16-17.

In response to this argument, Private Ledger discusses Horrocks and attempts unsuccessfully to distinguish it on the basis that in Horrocks, some of the forms were supplied by the principal and some proceeds from the transaction went to the principal. This Court did not identify such a limitation in Horrocks and it is not a distinction which affects the fundamental tenets of agency law enunciated in Horrocks. Private Ledger's claims that the plaintiffs presented no admissible evidence in the trial court to show that they could reasonably believe that the Red River Investment was a regular securities offering being sold through Private Ledger is made without record support and ignores significant parts of the record which must be viewed in the light most favorable to the plaintiffs in this Court. For example, the record clearly demonstrates that the transfer of funds from the plaintiffs' Private Ledger accounts was reported to plaintiffs on Private Ledger's statement sheet. (R. 600, 605) Therefore, Private Ledger's attempt to distinguish Horrocks does not withstand scrutiny.

With respect to the underlying case law established by this Court in Horrocks, that a principal is liable for the criminal acts of its agent, Private Ledger cites no Utah case which contradicts this fundamental proposition. Rather, Private Ledger relies on federal and

Mississippi cases which simply have no application in Utah. Additionally, as noted in the appellants' opening brief, these cases are distinguishable. For example, in its brief, Private Ledger cites Hauser v. Farrell, 14 F.3d 1338 (9th Cir. 1994), to support the trial court's ruling. However, as Private Ledger reluctantly acknowledges, a significant fact in Hauser distinguishes it from this case. Specifically, in Hauser the plaintiff investors "did not, in deposition excerpts provided to the court, contradict the brokers' representations that they told the customer that the [investment] would not be through [the brokerage firm]." 14 F.3d at 1343. In other words, unlike this case where Defendant Harry never informed Brgoch and Isaacs that the investment was not sanctioned by Private Ledger nor did Private Ledger inform Brgoch and Isaacs that Harry was acting as an independent contractor, the defendants in Hauser were specifically informed that the defendant brokerage firm did not sanction the investment at issue in that case. Other cases cited by Private Ledger which it claims support its position, unpublished federal district court opinions and a case from Mississippi, also simply do not support its position. Furthermore, Private Ledger ignores the case law in this state which is typified by Horrocks and the cases cited therein as well as other cases cited in the Brief of Appellants. These cases clearly demonstrate that **in this state** a principal is liable for the criminal acts perpetrated by its agent even when those acts are detrimental to the principal itself.

Private Ledger claims that the plaintiffs did not request information from Private Ledger concerning the Red River investment. Plaintiffs' failure to inquire of Private Ledger's corporate headquarters can be attributed to the fact that they rightfully believed that Harry represented Private Ledger, i.e. Harry and Private Ledger were one and the same. Therefore, when plaintiffs directed inquiries to Harry, they believed that ***they were directing inquiries to Private***

Ledger. In fact, a significant question arises as to why Private Ledger ***did not*** contact specific investors whose funds had been placed at risk by Harry and inform them immediately of the unauthorized transactions carried out by Harry when it discovered that Harry was dealing securities in violation of the agreement that he had signed with the company.

In their opening brief Brgoch and Isaacs asserted that summary judgment was precluded because disputed issues of material fact existed. Specifically, plaintiffs argued that Private Ledger tolerated "selling away," the practice perpetrated by Harry. In response Private Ledger claims that no admissible evidence existed which demonstrated that Private Ledger tolerated the practice of selling away. The evidence supporting plaintiffs' assertion was the affidavit of Cregg Cannon which was supplied to the trial court. (R. 617-19) Cannon was a broker in the Salt Lake office of Private Ledger with Defendant Ron Harry. While Private Ledger proclaims that a motion to strike Cannon's affidavit was filed by it, Private Ledger conspicuously fails to disclose to this Court that Cannon's affidavit was never stricken by the trial court and still stands as part of the record before this Court on this appeal. Cannon's affidavit raises significant issues of disputed fact concerning Private Ledger's assertions that it attempted to control the actions of its agents. However, evidence produced by the plaintiffs' various affidavits, including Cannon's affidavit, provided to the trial court clearly indicate that Private Ledger was aware of the practice of "selling away" by its agents and did little to control the practice. (R. 618, 619) The fact that Private Ledger requested its agents to renounce the practice of "selling away" substantiates its knowledge of the problem. Evidence presented by plaintiffs indicated that Private Ledger turned its back on the problem and chose to ignore the actions of its agents. (R. 619) This fact alone raises an issue of material fact concerning the extent of Harry's authority

and an issue of fact concerning the extent of control Private Ledger exerted over its agents. These issues were not resolved by the trial court and should have precluded summary judgment. Indeed, the extent of an agent's authority is a material question of fact which must be determined by the trier of fact. Diversified Development and Investment, Inc. v. Heil, 889 P.2d 1212, 1221 (N.M. 1995). Therefore, contrary to several of the assertions in Private Ledger's brief plaintiffs in fact did present to the trial court evidence which suggested that Private Ledger had failed to comply with industry standards concerning the practice of "selling away." This evidence was simply ignored by the trial court when it ruled on the motion for summary judgment.

The law in this jurisdiction, as stated by this court in Horrocks, is that the principal must be liable for the criminal acts of its agent even when those acts harm the principal if the agent is acting within his authority when he committed those acts. 892 P.2d at 16. In this case, the facts are abundantly clear that the plaintiffs perceived Defendant Harry to be cloaked with the apparent authority granted by Private Ledger to invest their money in the Red River Limited Partnership. To the plaintiffs, whose point of view should have been assumed by the trial court but was not, Defendant Harry had apparent authority derived from his managerial position with Private Ledger to deal in the securities. Brgoch and Isaacs only ever dealt with Harry at the Private Ledger office in Salt Lake City. When they needed to contact Harry, they contacted him at that office. Harry's business cards and letterhead announced Harry as a manager for the Private Ledger office in Salt Lake City. (R. 602, 607) Furthermore, Brgoch and Isaacs were never informed by Harry or Private Ledger that Harry was acting on his own behalf or even that he could have acted on his own behalf. (R. 602, 607) For all appearances to Brgoch and

Isaacs, Harry acted only on behalf of Private Ledger and under its direct control and authority.

POINT II

PRIVATE LEDGER'S CLAIM THAT PLAINTIFFS' ACTION WAS BARRED BY THE STATUTE OF LIMITATIONS IS NOT PROPERLY BEFORE THIS COURT BECAUSE THE TRIAL COURT RULED ADVERSELY TO PRIVATE LEDGER ON THIS ISSUE AND PRIVATE LEDGER DID NOT CROSS-APPEAL.

A. The statute of limitations issue is not properly before this Court.

For the first time in its responsive brief, Private Ledger asserts that summary judgment should have been granted because the statute of limitations barred plaintiffs' claims. However, what Private Ledger reluctantly admits without citation to the record is that the trial court specifically denied, both orally and in writing, that portion of Private Ledger's motion for summary judgment which raised this precise issue. The trial court's written order specifically stated:

> It is hereby ordered, decreed, and adjudged that the motion of defendants, Private Ledger Financial Services, Inc., Linsco Financial Services, Inc., and Linsco/Private Ledger Corporation, based on the statute of limitations, ***is denied*** on the grounds that the Court finds a question of fact to exist as to possible concealment of plaintiffs' claims by defendant, Ronald Harry.

(R. 821, emphasis added).

As stated elsewhere in this brief, this Court, in State v. South, has recently held that a party's failure to take issue with the trial court's adverse ruling by filing a cross-appeal means that the issue is not properly before the appellate court and must not be considered by that court. South is not the only case which stands for this proposition. For example, in Henretty v. Manti City Corp., 791 P.2d 506 (Utah 1990), the Utah Supreme Court refused to address the

appellees' attempt to cross-appeal from the trial court's finding which had been adverse to the appellees. 791 P.2d at 511. The court did not reach the issue which appellees sought to raise because no cross-appeal had been filed by the appellees. Specifically, the court stated:

> Rule 4(d) of the Rules of the Utah Supreme Court explicitly requires that a notice of cross-appeal be timely filed. There is no record of such a filing. Absent a cross-appeal, a respondent may not attack the judgment of the court below. "[I]f a respondent desires to attack the judgment and change it in his favor he must timely file a cross-appeal . . . ." Terry v. Zions Co-op Mercantile Inst., 617 P.2d 700, 701-02 (Utah 1980) . . . . For this reason, we decline to consider the merits of the [appellees'] purported cross-appeal.

791 P.2d at 511 (citations and footnote omitted).

In American Coal Co. v. Sandstrom, 689 P.2d 1 (Utah 1984), the State Industrial Commission in its brief claimed that a statute of limitations prohibited disbursement of funds from the State's Second Injury Fund. In the underlying administrative proceeding the administrative law judge had specifically ruled that the section of the statute relied on by the Industrial Commission had no application to the liability of the Second Injury Fund. In declining to reach the limitations issue on appeal, the Utah Supreme Court stated:

> The Industrial Commission raises the issue for the first time in its brief. . . . The Industrial Commission, having adopted the findings, conclusion and order of the administrative law judge in their entirety, cannot now raise the limitation issue. Further, for a party to raise an issue before this Court requires a cross-appeal. Therefore, the issue of the statute of limitations is not properly before this Court, and we therefore do not consider it.

689 P.2d at 4 (footnote omitted); see also Cerritos Trucking Co. v. Utah Venture No. 1, 645 P.2d 608, 613 (Utah 1982).

Thus, ample authority exists for the proposition that if the party which prevails overall in the trial court specifically loses on an issue before the trial court, the proper method for that party to raise the issue in the appellate court is via a cross-appeal. That party may not simply raise the issue in its responsive brief. If it does so, the appellate court must decline to consider the issue because the issue is not properly before it. In this case, Private Ledger raises for the first time in its responsive brief the issue of the statute of limitations. The trial court specifically ruled against Private Ledger on this issue. Therefore, the proper method for Private Ledger to raise that issue and rely on it in this Court was for Private Ledger to file a cross-appeal. However, Private Ledger has failed to do so and therefore this Court may not consider the limitations issue and must affirm the trial court's ruling that limitations issue presented a disputed issue of material fact which must be decided by the trier of fact.[5]

B. The trial court's conclusion on the limitations issue was correct.

Even if this Court chooses to reach the limitations issue on its merits, it must uphold the trial court's ruling that the limitations issue raised a disputed issue of material fact which must be decided by the trier of fact. The trial Court ruled against Private Ledger on the limitations issue because it concluded that factual questions concerning a delay in plaintiffs' discovery of their action due to Harry's active concealment required resolution by the trier of fact. (R. 821)

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[5]An additional basis exists for this Court to decline to reach the limitations issue presented by Private Ledger. Private Ledger has not marshalled the evidence which supports the trial court's ruling on the limitations issue. Since summary judgment was granted to Private Ledger, its challenge to the ruling would be equivalent to a challenge raised to a finding entered by the trial court. In that circumstance, the challenging party is required to marshal the evidence which supports the finding and then demonstrate why that evidence is insufficient. See, e.g., West Valley City v. Majestic Inv. Co., 818 P.2d 1311 (Utah Ct. App. 1991). Because Private Ledger has not even attempted to meet its burden on this issue, this Court should not consider the limitations issue.

Unfortunately, Private Ledger did nothing to notify plaintiffs that, when they dealt with Ronald Allen Harry, they were dealing with someone who was not what he appeared to the world to be, i.e. the manager of a Private Ledger office and an agent of Private Ledger under its direction and control with full apparent authority to act as such. This fact is important to the application of agency principles ***and*** to plaintiffs' discovery of the acts giving rise to their claims. Because of Harry's fraud, plaintiffs were unable to discover their cause of action and therefore, the cause of action did not accrue. See, e.g., Home v. B.M. Service, Inc., 661 P.2d 951, 952 (Utah 1983) ("[an action for relief on grounds of fraud or mistake] does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake." emphasis added). Substantial evidence presented to the trial court demonstrated that Harry blocked plaintiffs' discovery of their cause of action.[6] For example, Frank Brgoch stated the following:

> **Q.** When did you decide to make a complaint against Private Ledger?
>
> **A.** When we found out what really happened, what was really going on.
>
> **Q.** When did you find that out?
>
> **A.** Well, first of all, I complained to Ron Harry right off the bat, you know. We talked about that all afternoon, but as far as calling Private Ledger, it just never occurred to me to call them and say, hey, what's going on here. It just never occurred to me to do it because Ron Harry was my broker and he was supposed to be taking care of all of this. Then the Attorney General got into it. That's when we really realized what the impact was. Up until then, it just looked like he had just got us into something that would benefit somebody beside myself. And then when the Attorney General got into it, it was something altogether different.

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[6]All of the evidence presented in the body of this brief was contained in the text of memoranda submitted to the trial court. Record citations are to those portions of the memoranda which contain the evidence.

Q. So you didn't - -

A. As a matter of fact, it never even occurred to me to call Onaga Bank and get the paper work on this stuff. It was the Attorney General that did that.

Q. So you didn't try to bring a claim against Private Ledger until after you had talked to the Attorney General?

A. No, we didn't decide anything.

Q. When did you decide to bring a claim against Private Ledger?

A. When we found out that - I don't know who to word it - when I found out I got defrauded.

Q. When was that?

A. Somewhere along the way in all the discussions and trials and everything. (Emphasis added.)

(R. 586-87) The criminal trial of Ron Harry which Brgoch refers to occurred in December of 1991, and this case was filed in March of 1992. Brgoch stated about a meeting with Harry in June or July of 1988:

A. Yes, but during the next -- I guess it went on for a year or more. He was -- he kept promising me that he was going to take care of it. He was -- I wanted him to get me out of it and he indicated he was going to try. All of these negotiations, all those letters that he had out here, indicated that he was trying to negotiate. I wanted out of the program. I didn't want to negotiate it. I didn't want to do anything, and he knew that. But he kept telling me - yeah, I'll see what I can do. Every time I'd get down there and he came up with one of these offers I would say, Ron, I don't want that, I want out, and he would say, you just want to get out? Yes. I said that I'd even take a loss, but I want out of it. I want -- and this -- I don't know how many times this was I want out of this thing. He got sick of hearing it and I got sick of saying it, but he acted like he was going to make an effort to get me out of the partnership. That's why I lingered.

(R. 587)

Plaintiff Isaacs stated:

Q. Did you see [Harry] in person?

A. Yes.

Q. What was discussed?

A. Discussed was the money, what the money was for, and what was it doing in a bank in Kansas.

Q. What did Ron Harry say?

A. He said it was for real estate. what the devil did he call it, I can't recall now. Anyway, it was going to make us a lot of money, the term he used, it was a one time draw, there wouldn't be any further payments, and it would only last about a year. And that was about all he explained.

Q. Did he tell you that it was a limited partnership?

A. No.

Q. When did you find out that Red River was a limited partnership?

A. I guess it was a year later.

(R. 588) With regard to why assessment notices did not trigger inquiries, Isaacs stated:

Q. Do you recall receiving [an assessment notice] around July 10, 1989?

A. Yes

Q. Did you have another meeting with Ron harry after receiving this letter?

A. Yes.

Q. What did you discuss at that meeting?

A. The same thing as went on before. He said not to worry about it and I said, I just don't want any part of this thing, I want the money taken back out of it, or sold, do whatever you can to just return the money.

Q. What did he say?

A. He just danced around it. He didn't say anything about being able to get the money out. Once again, the reassurance, nothing to be concerned about.

(R. 589) Isaacs further stated:

> Q. Did you ask Ron Harry why in the spring of 1990, or April of 1990, you were still receiving letters demanding the further contribution?
>
> A. It was starting to get pretty antsy by then. I don't know what's happening. I don't know when . . . My question was, how come this wasn't double; in other words, instead of just being $17,000.
>
> Q. Because you hadn't paid the year before?
>
> A. Yeah. But I didn't get an answer except it wasn't anything for me to be worried about, he was still on top of it, he was still taking care of it.
>
> Q. Did you say anything to him like it doesn't appear like he's taking care of it because you keep getting letters?
>
> A. Yeah, I told him from some of the subsequent letters I was getting.
>
> Q. What would he say?
>
> A. Nothing. He would just fend it, fend it off. He didn't seem too upset by it. He didn't show any - simply any emotion to the fact that there was something going wrong or there would be any further ongoing trouble.

(R. 590)

Defendant Private Ledger argues that a statement from the Bank of Onaga, Kansas, started the statute of limitations running on plaintiffs' causes of action. In reality plaintiffs did inquire shortly after receiving the statement but Harry, the agent of Private Ledger, continued to conceal the fraud and misrepresentation each time he was asked about limited partnerships, assessments, etc.

The Utah Supreme Court has frequently stated that concealment or deception acts to prevent the running of the statute of limitations. See, e.g., Myers v. McDonald, 635 P.2d 84, 86 (Utah 1981) ("[T]he limitation period does not begin to run until the discovery of facts forming the basis for the cause of action. . . . [T]his court has held that proof of concealment

or misleading by the defendant precludes the defendant from relying on the statute of limitations."); see also Vincent v. Salt Lake County, 583 P.2d 105 (Utah 1978).

In this case when plaintiffs became concerned, they went to defendant Harry, their trusted broker at Private Ledger, but Harry misled them and lied to them on several occasions. Even in late March of 1989, when plaintiffs received the first assessment, they again met with Ron Harry and he again appeased them, misled them, told them that everything would be okay and taken care of.

As plaintiffs have consistently asserted, they learned of the fraud only sometime in April or May of 1990, after the Attorney General's Office subpoenaed the records of the Bank of Onaga. That subpoena produced a limited partnership certificate showing non-assessable interests, forged IRA transfer documents, and other documents which allowed plaintiffs to piece together the transfer shown on the Private Ledger statements to FNB Onaga.

The trial court's conclusion that the application of the statute of limitations presented disputed issues of material fact was supported by evidence presented to the trial court.

CONCLUSION

Two of the issues raised by Private Ledger in its brief were issues which were decided adversely to it in the trial court and because no cross-appeal was filed, those issues should not be considered by this Court. Finally, for the reasons set forth in this brief and the Brief of Appellants, Plaintiffs request that this Court reverse the judgment of the trial court and remand this case for trial.

DATED this 6th day of November, 1995.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 1995, two copies of the foregoing REPLY BRIEF OF APPELLANTS were either hand delivered or mailed, in the U. S. mail, postage prepaid, to counsel as follows:

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